Supreme Court, U.S.
FILED
APR 14 2005
OFFICE OF THE CLERK

No.04-951

In The
Supreme Court of the United States

MATTHEW S. ENGLISH

Petitioner,

v.

SHERRY BURT

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A habeas petitioner is not entitled to habeas relief on a claim that was not properly presented to the State courts where the State court refused to review the claim on that basis unless the petitioner can demonstrate cause for the default and actual prejudice or demonstrates that the failure to consider the claim will result in a fundamental miscarriage of justice. Here, Petitioner failed to raise his federal habeas claim in his direct appeal as required by the Michigan Court Rules, the Michigan Supreme Court refused to review the claim on that basis, and Petitioner did not make the required showing to overcome the default. Did the district court correctly grant summary judgment on the basis of procedural default?

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OPINIONS BELOW

Following Petitioner's plea-based conviction and sentence, Petitioner filed a claim of appeal. The Michigan Court of Appeals dismissed Petitioner's claim of appeal for lack of jurisdiction on July 19, 2001. *People v. English*, Michigan Court of Appeals no. 235040, Unpublished Order, App. 1a.

On August 8, 2002, Petitioner filed a motion for relief from judgment in the state trial court. On August 22, 2002, the trial court denied the motion. *People v. English*, Case No. 00-2518-FH, Unpublished Order, App. 2a.

Petitioner's application for leave to appeal the trial court's order denying collateral relief was denied by the Michigan Court of Appeals on October 10, 2002. *People v. English*, Michigan Court of Appeals no. 243738, App. 4a. Petitioner's subsequent application for leave to appeal in the Michigan Supreme Court was denied on March 31, 2003. *People v. English*, Michigan Supreme Court no. 122547, App. 5a.

Petitioner's application for a writ of habeas relief filed in the United States District Court for the Eastern District of Michigan was dismissed on May 17, 2004, App. 6a. The United States Court of Appeals for the Sixth Circuit denied Petitioner a certificate of appealability on December 6, 2004, App. 12a.

JURISDICTION

Petitioner was convicted by way of his guilty plea in St. Clair County, Michigan, Circuit Court on July 25, 2001. The district court denied Petitioner's application for a writ of habeas corpus on May 17, 2004. The United States Court of Appeals for the Sixth Circuit denied Petitioner's request for a certificate of appealability on December 3, 2004. The petition for writ of certiorari is being filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Michigan Court Rule (M.C.R.) 6.508(D) provides:

> Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (1) seeks relief from a judgment of conviction and sentence that still is subject to change on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceedings under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief.

STATEMENT OF THE CASE

On December 27, 2000, Petitioner pleaded *nolo contendere* to two counts of vehicular manslaughter and one count of felonious driving in the St. Clair County Circuit Court, Michigan. The trial court initially granted Petitioner Youthful Trainee status and sentenced him to three years probation with

the first 30 days to be served at the St. Clair County Jail, the next 120 days to be served at Huron House under house arrest, followed by Special Alternative Incarceration "boot camp" if Petitioner met certain conditions. The prosecution subsequently filed a motion to correct the sentence on the ground that Youthful Trainee status was only available following a guilty plea, which the trial court granted. On May 29, 2001, the trial court re-sentenced Petitioner to five years probation with the condition that he remain in custody during the first year of probation, including house arrest at Huron House and completion of Special Alternative Incarceration "boot camp," and other conditions.

Petitioner subsequently filed a claim of appeal with the Michigan Court of Appeals, which was dismissed for lack of jurisdiction because Petitioner did not have an appeal of right from his plea-based conviction. *See People v. English*, Michigan Court of Appeals no. 235040, App. 1a.

On July 25, 2001, Petitioner pleaded guilty to violating the conditions of his probation. On August 7, 2001, the trial court discharged him from probation as a violator and sentenced him to 72 to 180 months imprisonment with credit for 169 days served.

On August 8, 2002, Petitioner filed a motion for relief from judgment in the state trial court asserting that trial counsel was ineffective for: (1) erroneously advising him that he qualified for Youthful Trainee status, and (2) failing to have an independent accident reconstruction evaluation conducted. The trial court denied the motion finding that Petitioner had failed "to establish 'good cause' and 'actual prejudice' from the alleged irregularities in support of his claim for relief." (August 22, 2002 Opinion and Order Denying Motion for Relief from Judgment, p 2). Petitioner filed an application for leave to appeal this decision with the Michigan Court of Appeals, which was denied "for lack of merit in the grounds

presented." *People v. English*, Michigan Court of Appeals no. 243738, App. 4a. Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. English*, Michigan Supreme Court no. 122547, App. 5a.

Petitioner, through counsel, filed his federal habeas petition on September 5, 2003, asserting that trial counsel was ineffective for failing to obtain an independent accident reconstruction expert. On March 10, 2004, Respondent filed a motion for summary judgment seeking dismissal of the petition on the basis of procedural default. On May 17, 2004, the district court granted the motion for summary judgment and dismissed the petition. Petitioner then filed an application for a certificate of appealability in the United States Court of Appeals for the Sixth Circuit. On December 6, 2004, the Court of Appeals denied the application.

REASONS FOR DENYING THE PETITION

This petition raises only one issue and it involves a simple matter of State procedural law. Petitioner claims that the Michigan Supreme Court's order denying leave to appeal from the denial of his motion for relief from judgment is not a sufficient invocation of a procedural bar so as to warrant summary dismissal. This question, which is entirely dependent on state procedural rules, does not present an important question of federal law. Moreover, the Sixth Circuit's interpretation of that state procedural law is not in conflict with any of this Court's decisions nor is it in conflict with any other circuit decision. Finally, the district court correctly granted summary judgment on the basis of procedural default. Because the claim does not present an important question of federal law and is without merit, this Court should not grant certiorari.

I. A habeas petitioner is not entitled to habeas relief on a claim that was not properly presented to the State courts where the State court refused to review the claim on that basis unless the petitioner can demonstrate cause for the default and actual prejudice or demonstrates that the failure to consider the claim will result in a fundamental miscarriage of justice. Here, Petitioner failed to raise his federal habeas claim in his direct appeal as required by the Michigan Court Rules, the Michigan Supreme Court refused to review the claim on that basis, and Petitioner did not make the required showing to overcome the default. Did the district court correctly grant summary judgment on the basis of procedural default?

A State prisoner may not challenge the constitutionality of his conviction by seeking habeas relief under 28 U.S.C. § 2254 unless he has exhausted his available State remedies. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The State exhaustion requirement may not be circumvented by failing to follow State procedural rules. *See Gray v. Netherland*, 518 U.S. 152, 162 (1996). If a State prisoner fails to obtain review of his federal constitutional claim in State court because he failed to present it in accordance with state procedural rules, federal habeas review is also barred unless the prisoner can demonstrate cause for the default and actual prejudice, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman, supra* at 750-751.

In deciding whether a habeas petitioner procedurally defaulted his federal claim in state court, the federal habeas court examines three factors: (1) whether there is a State procedural rule applicable to the petitioner's claim that he did not comply with; (2) whether the State courts actually enforced the State procedural rule against petitioner's claim; and (3) whether the State procedural forfeiture is an adequate and

independent State ground upon which the state can rely to foreclose review. *Hutchinson v. Bell*, 303 F.3d 720, 735 (6th Cir. 2002).

In this case, the Michigan Supreme Court denied leave to appeal pursuant to M.C.R. 6.508(D). Subchapter 6.500 of the Michigan Court Rules governs motions for relief from judgment in criminal cases in Michigan and provides the exclusive procedure for challenging a conviction or sentence after the conclusion of the defendant's direct appeal. M.C.R. 6.508(D) states as follows:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (1) seeks relief from a judgment of conviction and sentence that still is subject to change on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceedings under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

There is no question that this provision is an applicable State procedural rule requiring a State prisoner to bring all of his claims in his direct appeal. It is undisputed that Petitioner did not comply with the rule. Petitioner does not assert that the provision is not an adequate and independent state ground upon which the state can rely to deny review. Thus, the only question here is whether the Michigan Supreme Court's order denying leave to appeal from the denial of his motion for relief from judgment was an actual enforcement of that rule. In determining whether a state court based its judgment on a procedural rule, a federal habeas court must determine whether the last order issued by the state court is explained or unexplained. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Coleman, supra* at 750. An unexplained order is an order whose text or accompanying opinion does not disclose the reason for the judgment. *Ylst*, 501 U.S. at 802. Where the last state court order denying a federal claim is unexplained by opinion or text, the habeas court should "look through" the unexplained order to the last reasoned opinion to determine whether the state courts had earlier imposed a procedural default which was merely affirmed by the higher court. *Id.*

If the order is explained, in that the text discloses reliance on a procedural bar, the federal habeas court must impose the procedural default. Here, the order at issue is the March 31, 2003, standard order of the Michigan Supreme Court that stated: "On order of the Court, the application for leave to appeal from the October 10, 2002, decision of the Court of Appeals is considered, and it is DENIED because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)."

The standard order used by the Michigan Supreme Court in this case has been held to be an explained order in no less than four published Sixth Circuit decisions. *See Hargrave-Thomas v. Yukins*, 374 F.3d 383 (6th Cir. 2004); *Burroughs v. Makowski*, 282 F.3d 410 (6th Cir. 2002); *Simpson v. Jones*, 238 F.3d 399 (6th Cir. 2000); *Munson v. Kapture*, 384 F.3d 310 (6th Cir. 2004). In *Munson*, 384 F.3d at 313, the Sixth Circuit specifically held:

> For purposes of procedural default, the "state judgment" with which we are concerned is "the last *explained* state court judgment." *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991). [Petitioner] argues that the last state court judgment is the trial court's opinion denying his post-conviction motion for relief. . . Contrary to [Petitioner]'s assertion, however, the last explained state court judgment in this case is the Michigan Supreme Court's order denying review of [Petitioner]'s claims based upon his failure to comply with Rule 6.508(D). We have held that orders such as that issued by the Michigan Supreme Court constitute "explained" state court judgments for purposes of procedural default. *See, e.g., Simpson v. Jones*, 238 F.3d 399, 407-08 (6th Cir. 2000)(holding that an order issued by the Michigan Supreme Court stating that the petitioner had "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)"-though "brief"-constituted the last explained state court judgment in the case).

The *Munson* court's interpretation of the Michigan Supreme Court's order, i.e. that it is a reliance on a procedural default has been repeatedly affirmed in the Sixth Circuit and more importantly it has been affirmed by the Michigan Supreme Court itself.

In 2001, the Michigan Supreme Court issued a decision in *People v. Jackson*, 465 Mich. 390; 633 NW2d 825 (2001). In *Jackson*, in a post-judgment motion for relief from judgment, the defendant maintained that he was not required to show good cause for failure to raise his claim regarding improper waiver of jurisdiction by the juvenile division of the probate court in his direct appeal or that he suffered actual prejudice as a result. The Michigan Supreme Court rejected Jackson's argument explaining that:

> Pursuant to MCR 6.508(D), "the defendant has the burden of establishing entitlement to the relief requested." The circuit judge's second opinion discussed the merits of the juvenile court waiver issue and found it to be without merit. Accordingly, the defendant failed to establish his entitlement to relief. Thus, the defendant has not been deprived of review of the issue by the operation of subrule (D)(3). [*People v. Jackson*, 465 Mich. at 834]

The Michigan Court appended a footnote at the end of the above-quoted excerpt (footnote 10) which stated:

> Nor does the Court of Appeals citation of the court rule indicate otherwise. The Court of Appeals cited MCR 6.508(D), of which sub-rule (3) is only a part. The Court of Appeals [standard form] order [denying the application for failure to meet the burden of establishing entitlement to relief under MCR 6.508] cited the rule in the context of its statement that the defendant had not met his burden, and did not refer to this as a failure to establish good cause or prejudice.

The State of Michigan moved for rehearing in *Jackson*, specifically asking the Michigan Supreme Court to delete footnote 10 from its opinion. In the motion for rehearing, the State explained the reason for its request:

> The footnote seems to indicate that the Michigan appellate courts' orders that cite MCR 6.508(D) are ambiguous, i.e., the application could have been denied on the merits or it could have been denied on the basis of failure to establish cause and prejudice. Obviously if the order is ambiguous, it is not an explained order and the State is deprived of its procedural default defense in all cases in which the above form orders are issued. Such a result puts in jeopardy state convictions that have been litigated in state courts.

Following the issuance of the opinion in *People v. Jackson*, the United States District Court for the Eastern District of Michigan issued a Report and Recommendation interpreting footnote 10 as an indication that Court's order implied a merit review. The State then supplemented its motion for rehearing stating:

> . . . The federal court for the eastern district has now interpreted footnote 10 even more broadly than the States had feared, i.e., that this Court's form orders are not ambiguous, but necessarily imply a decision by the Court on the merits of the claims. . . .
>
> This interpretation completely eviscerates the procedural default defense in habeas proceedings in Michigan because the State cannot rely on a procedural default defense if the last state court addressed the merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Thus, the State finds itself in the position of defending claims held by the federal court to have been addressed on the merits that may never have had any review by any state court.
>
> The impact of footnote 10 goes far beyond just increasing the number of claims that the States will

> required be to respond to on the merits. It has placed the State in the position of defending state court convictions without the benefit of state court review at every level with the accompanying record, review, and analysis. . . .
>
> Finally, the federal court's interpretation of footnote 10 denies the State the advantage of relying on this Court's procedural rulings which there is every reason to believe the Court does apply when appropriate pursuant to M.C.R. 6.508(D)(2) and (3).

On November 8, 2001, the Michigan Supreme Court ruled on the State's rehearing motion, and in lieu of granting rehearing, the Court amended its September 25, 2001, opinion in *Jackson* and deleted footnote 10.

As can be seen from this discussion, the entire basis of the State's motion for rehearing in the Michigan Supreme Court was that the federal courts could interpret footnote 10 as implying that the standard order was not a procedural default. As a result, within days of issuing its opinion in *People v. Jackson*, the Michigan Supreme Court deleted the footnote so that there would be no confusion over whether the order invoked a procedural bar.

Petitioner's argument that the Michigan Supreme Court's order is an unexplained order has been rejected several times by the Sixth Circuit as well as by the Michigan Supreme Court itself. Therefore, since Petitioner failed to present his federal habeas claim to the state courts in accordance with state procedural rules and since the Michigan Supreme Court relied upon that rule in denying relief, Petitioner's claim is procedurally defaulted unless he can establish cause and prejudice of a miscarriage of justice.

Petitioner argues that, even if his claim is procedurally defaulted, habeas review is not barred because he can show cause to excuse the default. Petitioner points out that he was not entitled to a direct appeal by right nor was he entitled to appointed counsel to pursue that appeal. Petitioner's argument overlooks two critical facts. First, the State did not deny Petitioner review of his federal habeas claim because he failed to obtain a merit review of it. Rather, the State refused to review it collaterally because Petitioner could have, but did not, present the claim for review in his application for leave to appeal. Second, while Petitioner may not have been entitled to appointed counsel under Michigan law, the fact is he had counsel when he sought review in the Michigan Court of Appeals. Thus, neither of those facts constitutes cause to excuse his procedural default.

Petitioner also argues that habeas review is not barred because he has shown a miscarriage of justice. Specifically, Petitioner argues that "his 'actual innocence' was established through the initial police investigation and the reports of the defense accident reconstructionists who found that Mr. English was not to blame for the accident." In order to invoke the narrow exception of "miscarriage of justice" a petitioner is required to show that a constitutional violation has probably resulted in the conviction of who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 314, 321 (1995). Such a claim requires a petitioner to support his allegations of constitutional error with new reliable evidence of his actual innocence. Since Petitioner has not supported his claim that he is actually innocent with new evidence, the exception does not apply. *Id.* at 324.

In sum, because Petitioner failed to present his claim to the state courts in accordance with state rules and because the Michigan Supreme Court relied upon that rule in denying relief, the claim is procedurally defaulted. Petitioner has not established cause and prejudice nor has he established a

fundamental miscarriage of justice. Therefore, the district court in this case correctly determined that habeas review is barred and granted Respondent's motion for summary judgment and the Sixth Circuit correctly denied a certificate of appealability.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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